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Dear Ms Chia

20th April 2017

Re: Joint IMDA-AGC Review Of The Electronic Transactions Act (Cap 88) – Review of Draft UNCITRAL Model Law On Electronic Transferable Records (Public Consultation Paper), submission based on the extended deadline of 24th April 2017.

Respondent's Industry: Banking sector

Deutsche Bank's Global Transaction Banking (GTB) welcomes the opportunity to respond to the IMDA-AGC's consultation paper on the "Review of the Electronic Transactions Act (Cap 88) – Review of draft UNCITRAL Model Law on Electronic Transferable Records".

We support the IMDA-AGC proposals for Singapore to adopt the provisions of the Model Law into its domestic legislation. Against the background of significant national and industry initiatives on the application of advance technologies in trade and supply chain finance areas, the Model Law is an innovation that can provide needed legal clarity for sustainability to these financial digitalisation efforts. Hence, we also support the proposal for Singapore to be an early adopter of the Model Law.

Overall, we would recommend active industry dialogues to grow the level of awareness and facilitate common interpretation in the industry, together with the public and judicial sectors, on the Model Law's key and new tenets like the "general reliability standard". Our response focuses on the following key considerations which we hope the IMDA-AGC can consider:

- **Trading partners' adoption.** As Singapore is a significant cross-border trade hub, engagements with Singapore's trading partners on their adoption plans of the model law would also be important to realise the deeper and longer-term benefits.
- **Avoidance of duplicated costs and requirements.** The banking industry in general and Singapore's banking industry in particular are regulated by stringent technology risks management and cybersecurity requirements. These standards should be taken into consideration in any accreditation requirements to avoid duplicated costs and inadvertent overlaps.



- **Mitigating unintended high market barriers to adopt.** While we recognise the importance and need for a minimum standard of reliability, which would serve to facilitate trust and adoption of ETRs, Singapore should avoid imposing overly onerous standards to avoid unintended effects of high market adoption barriers from new costs and complexities.

Our detailed responses to the consultation questions are enclosed. We would be happy to discuss any of the points raised or to answer any questions that you may have. Thank you.

Yours faithfully,

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Yours faithfully,

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Response.

Question 1: Should Singapore adopt the provisions of the Model Law into its domestic legislation?

Yes, Singapore should adopt the appropriate provisions of the Model Law into its domestic legislation.

We recognise that it has been legally challenging to recognise electronic mimics of paper-based equivalent transferable records that needed (i) true copy and (ii) physical possession of the true copy to transfer title.

This Model Law represents an innovation and a start to address these challenges. In turn, this can pave the way for the industry and the broader economy to adopt advance technology in trade and supply chain finance activities to raise productivity, create new value creation potentials and realise higher levels of competitiveness.

Beyond the economic benefits, the Model Law also represents an important progressive step for Singapore as part of its realisation of its aspirations and goals that have been articulated by the Committee of the Future Economy, and in the Smart City and Smart Financial Centre initiatives.

Question 2: If the answer to Question 1 is “Yes”, should Singapore wait for other jurisdictions to adopt the provisions of the Model Law first? Are there any downsides to Singapore being an early adopter of the Model Law?

We are of the view that Singapore should be an early adopter of the provisions of the Model Law. While there can be initial downsides to Singapore being an early adopter, the eventual benefits can outweigh them.

As the Model Law is aligned to Singapore's national goals and competitiveness, being an early adopter can allow participants more time to apply the law and work out the details and bridge the gaps between law and market practices. This can increase the practical effectiveness of the provisions of the Model Law after they have been adopted into Singapore's Law. As this process needs time, starting early can be beneficial to all stakeholders.

Secondly, the Model Law is directly related to the trade ecosystem and trade financing, whose volume is a multiple of Singapore's GDP, underpins Singapore's global competitiveness and attracts economic activities to flow through or to be hub-ed in Singapore. The Model Law is also a synergistic factor to Singapore's National Trade Platform. Therefore, there is little visible risk that the Model Law is without alignment with Singapore's current initiatives and future goals.

We would however add that in Singapore's context the implementation of ETRs is likely to find greatest application and relevance in cross-border transactions. Therefore, Singapore's implementation of the Model Law cannot take place in a vacuum but requires considerations of the position in other jurisdictions / trading partners, and coordinating with them.

A possible downside to being an early adopter is likely to be the lack of uniform international laws, standards and market practices to act as references and to accelerate the learning and adoption curve. This and inconsistent positions between jurisdictions can initially cause confusion and



negative publicity especially if the main stakeholders across the value-chain i.e. from shippers to banks and the judicial processes are under-prepared.

In this regard, we would recommend that Singapore maintain close dialogues with other jurisdictions on the implementation of the Model Law. Singapore may also wish to consider rolling out the implementation of the Model Law with one or two trading partners.

Within Singapore, we would also propose further mitigating and managing the abovementioned risks with close private-public sector collaboration and communication.

Question 3: If the provisions of the draft Model Law are to be adopted by Singapore –

(a) Do you agree that it is not necessary to permit parties to derogate or vary by agreement any provisions of the draft Model Law?

The core tenets of the draft Model Law should not be permitted to be derogated. These tenets include Composite Record, Singularity and electronic endorsements.

However, we hold the view that it may be desirable to permit parties to derogate or vary by agreement certain provisions of the draft Model Law in order to recognise industry's "uneven" readiness to fully process electronic transferable records ("ETRs").

(b) If you answer to (a) was "no", which provisions should Singapore permit parties to derogate or vary from by agreement and why?

From a banking perspective, we believe it could be beneficial to permit derogation from the following articles of the Model Law:

Article 7. Legal recognition of an electronic transferable record.

In our view, Article 7 could potentially give rise to ambiguity. Article 7(1) provides that an electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

We note that the latest draft of the Model Law states that nothing in the Model Law requires a person to use ETRs: Article 7(2). In this regard, the explanatory note to the draft Model Law (A/CN.9/920) ("**Explanatory Note**") states that legal recognition of ETRs does not imply a requirement to use or accept them. It is however open to the enacting jurisdiction to mandate the use of ETRs: paragraph 44 of the Explanatory Note.

This article if interpreted as mandating the use and acceptance of ETRs could have the effect of compelling recipients of ETRs to accept such records potentially even against the will of the recipient.

In practical terms, today, there is a wide-spread mix of manual and digitalised processes by participants across the trade ecosystem. Therefore, the law needs to make allowances that a recipient of an ETR may not necessarily be ready or a position to process it, especially during the initial stages of industry's uses of the Model Law after it has been adopted by Singapore.

Accordingly, Singapore may wish to clarify its position on whether ETRs are to be mandatorily used or accepted under Singapore law. If there is to be a legal presumption in favour of the use / acceptance of ETRs, we would propose that parties be allowed to contract out of Article 7 and expressly agree not to permit the use / acceptance of ETRs.



Article 12. General reliability standard.

We recognise Article 12 as a key article in the Model Law. However, the broad wording of the article could give rise to uncertainty and practical difficulties in implementation.

According to the Explanatory Note, Article 12 aims to set out of a list of circumstances which is illustrative and not exhaustive: Paragraph 104. Such circumstances are meant to create an “objective reliability standard” and therefore the relevance of the agreement of the parties is excluded: Paragraph 119.

In the nascent stages of implementing the Model Law, there would be a lack of a body of industry standards and market practice that parties can rely on. In our view, parties should therefore have autonomy to determine what they consider to be reliable standards for the purposes of their transactions, which could in some cases entail derogation from Article 12.

As a number of other articles are dependent on Article 12 (namely, Articles 9, 10, 11, 13, 17, 18 and 19), Article 12 is a critical article and we would recommend for further industry dialogues to review and better understand how this Article can be cost-effectively applied and balanced with acceptable reliability standards.

We would like to highlight the following as potential areas for such dialogues.

- a) Sub-section (a)(iii) / Paragraph 111 of the Explanatory Notes. While there is a direct relationship between the notion of integrity and “authorised” changes to the system used in ETRs, how should “authorised changes” be interpreted in today’s practices and uses of open-sourced programming code as a basis for systems? If “authorised changes” implies an exclusion of open-source programming code, it creates a potential to unnecessarily exclude new and innovative systems utilising advance technologies, affordable systems that can be available to businesses to participate in the digitalised flows of ETRs and create an unintended divide between large and smaller systems providers. Or should “authorised” changes only be applicable to the access to and use of the main systems that can effect changes to the ETRs?
- b) Sub-section (a)(v) / Paragraph 113 of the Explanatory Note. Even as this requirement seeks to ensure the trust of “reliable systems”, it can create possibilities of high implementation and recurring costs to make paper-based systems comparatively more cost effective, which can lead to barriers to adoption of ETRs by the industry. Please further refer to our response to Question 4 of the consultation set out below.
- c) Sub-section (a)(vi) / Paragraph 114 of the Explanatory Note: while we understand the rationale behind the creation of an accreditation / certification process, such processes could lead to additional costs to the industry and inhibit effective operationalisation of the Model Law upon its adoption by Singapore. We elaborate on these points below in our response to Question 4 of the consultation.
- d) Sub-section (a)(vii) / Paragraph 115 of the Explanatory Note. Standards are important but as the draft Model Law will be the first time that legal systems recognise electronic transferable records, and it can encompass uses of advance technology, there can be a period of time where there will be an absence of internationally accepted standards and applicable industry



practices. The need for such standards immediately at the start of the adoption of ETR can drive market participants to favour “wait-and-see” to avoid duplicated investments. If many market participants adopt such a strategy, it can jeopardise the success of the adoption of the Model Law.

Singapore, as an early adopter, will need to establish such standards and practices. As part of its adoption, Singapore authorities can initiate situation-based studies and dialogues between private-public sector participants to mitigate increased litigation based on misunderstanding of complex technical matters.

Article 15. Issuance of multiple originals.

Article 15 contemplates the issuance of multiple ETRs where the law permits the issuance of more than one original of a transferable document or instrument.

The Explanatory Note raises several interesting points, including:

- a) that the Model Law does not prevent the possibility of issuing multiple originals on different media (e.g. one on paper and one in electronic form): Paragraph 132.
- b) that such practice could expose parties to the possibility of multiple claims for the same performance based on the presentation of each original: paragraph 134. While such a risk could in principle also exist in the context of paper documents / instruments, the risk is potentially more acute in the case of ETRs.
- c) that the same functions pursued with the issuance of multiple original transferable documents or instruments may be achieved in an electronic environment by attributing selective control on one ETR to multiple entities: Paragraph 134.

In the spirit of party autonomy, we are of the view that parties should be allowed to assess whether to permit the issuance of multiple ETRs and/or whether to derogate from Article 15.

This would be consistent with point a) above where it is contemplated that parties could explicitly agree on how to create multiple “originals” of a transferable document / instrument.

Article 20. Non-discrimination of foreign electronic transferable records.

The considerations are similar with those given for Article 7. Please refer to our views on Article 7 set out above.

Question 4: If the provisions of the draft Model Law are adopted by Singapore, should a system of accreditation by an accreditation body, of the methods employed by an ETR management system, be introduced for providers of an ETR system?

There are different positions that can be taken on this.

On one hand, we have set out our observations above regarding potential uncertainty about industry standards and market practice. One broad thrust of our comments relates to the open-endedness and generality in which the Model Law attempts to define what constitutes an appropriate standard of reliability.



Some of these concerns could at least in part be mitigated by the creation of an accreditation system. For example, the usage of an accredited service provider could be used to raise a presumption, in applicable situations, that the criteria of using a “reliable method” has been satisfied.

An accreditation system could also conceivably inspire greater confidence and lead to a higher take up in the usage of ETRs.

On the other hand, we note that presently, systems used by the trade ecosystem are not accredited. An establishment of an accreditation body can increase the complexity and costs to raise barriers to adopt ETRs in ways that include:

- a) Issues of governance, membership and membership fees, and legal responsibilities of the new accreditation body.
- b) Issues of proportionate, equitable and transparent criteria to be applied to systems offered by fintechs, smaller and larger ETR system providers. As an assumption, larger companies can have more resources to manage the accreditation process and ongoing requirement to remain accredited and thus create an uneven competitive field over time.
- c) Accreditation can cause unintended consequences to favour existing and proven systems to inhibit technology innovation and faster adoption of competitive new technologies.
- d) From the banking industry’s angle, the Singapore banking industry is already regulated by stringent technology risk management and cybersecurity-related regulations. The addition of an accreditation body for the systems used by banks can duplicate and add unnecessary costs.

Technology architectures of regional and global firms can complicate accreditations to make it a complex matter that can deter uses of ETRs. For example,

- e) Parts of the technology ETR systems platform can be maintained outside of Singapore, especially if other countries start adopting the Model Law. For participants utilising regional or global systems for ETRs, requiring these systems to be accredited can introduce cross-border complexities including harmonisation of different accreditation standards.
- f) Complexities can also arise from separate technology systems that are holding portions of a “composite” ETR to raise the questions of whether these systems – and their back-up systems – should also be accredited. If so, where is the line for accreditation to be drawn?

In our view, this is a question that bears further detailed consideration and discussion with industry players to foster an acceptable standard of reliability that can evolve through time.

Question 5: If the provisions of the Model Law are to be adopted by Singapore, is there a necessity for draft article 13 to be expanded by enacting provisions on the time and place of the dispatch and receipt of electronic transferable records?

Article 13 states that a “reliable method” shall be used to indicate the time or place with respect to an ETR. In this regard, we refer to our comments above regarding the relevance of the agreement of parties to determining what constitutes a “reliable method”.



Our views on the relevance of the agreement of parties appear to be in line with paragraph 122 of the Explanatory Note which states that provisions relating to the indication of time and place, if any, are to be found in substantive law which may indicate to what extent and which parties may agree on it.

Question 6: Do you have comments on any other draft article of the draft Model Law? If so, please identify the specific draft article in your comment and if relevant, the specific paragraphs of the Explanatory Notes in A/CN.9/920 that your comment relates to.

No comments

[end]